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CHARLES ELMORE GROPL
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In the

Supreme Court of the United States

OCTOBER TERM, 1950

No. 262

CHARLES A. CAROLIN,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent

PETITIONER'S REPLY BRIEF

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nor the language on page 13—"Since the undisputed facts support the Tax Court's conclusion that the parties did not in good faith and acting with a business purpose intend to form a *bona fide* business partnership * * *". The only language in the entire decision of the Tax Court on this point are these words, "We sustain respondent's determination that the wife should not be recognized as a partner for *tax purposes*" (Italics supplied), (R. 123). Nowhere in respondent's determination is there a finding that petitioner and his wife were not acting in good faith with intent to join together as partners (R. 6-10). To paraphrase the words of this Court in the *Culbertson* case (P. 743) "Not once in its (Tax Court) opinion is there even an oblique reference to any lack of intent on the part of petitioner and his wife to combine their capital and services for the purpose of carrying on the business." The most that can be said of the Tax Court decision is that it held the services of Helen E. Carolin were not "vital" and her capital contribution did not "originate" with her, therefore, for tax purposes, she should not be recognized as a partner. This Court took great pains in the *Culbertson* case to point out that the determination of the existence of a partnership is no different for tax purposes than for other purposes.[1]

Respondent argues, after reiterating the Tax Court's findings of fact, that those findings of fact justify a determination that this was not a situation where "the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enter-

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[1] Mr. Justice Frankfurter stated (P. 750), "The final sentence of the portion quoted [from Tower case] underlines the fact that the Court did not purport to announce a special concept of 'partnership' for tax purposes differing from the concept that rules in ordinary commercial-law cases".

prise." That contention is not well founded. As pointed out in our original brief, it is for the Tax Court not the Court of Appeals to ascertain the existence of the partnership. On pages 11 to 12 of our original brief we discussed the *Sam H. Miller v. Commissioner* case decided by the Court of Appeals below. In that case respondent similarly argued that the conclusion of the Tax Court in denying the partnership was correct even though the Court had not expressly found as to intent. The Court of Appeals below conceding the persuasiveness of respondent's contention nonetheless held that in the absence of such findings by the Tax Court the case must be remanded to the Tax Court under the *Culbertson* case. Respondent is not seeking certiorari in that case. Furthermore, the Tax Court did not consider *all* the facts in the case which bore on the intent of the parties. There were six instances of material and uncontroverted testimony in the record which bore upon the intentions of the parties to which the Tax Court made no reference in its Findings of Fact. The Tax Court was concerned with finding only as to "vital services" and "original capital" in arriving at its determination of the issue in the case. The testimony not found in the Tax Court's findings are:

(a) That in the spring of 1938, an agreement was entered into between Helen E. Carolin and her future mother-in-law, Louise W. Carolin, whereby Helen E. Carolin would continue working to help support herself and petitioner so that he could stay with the foundry, provided, however, the brothers and sisters signed off their interest in the foundry and that the business would then be between her, petitioner and his mother. That the mother agreed to give petitioner and Helen E. Carolin a partnership in the business when the brothers and sisters did sign off (R. 66, 30).

(b) That petitioner and Helen E. Carolin believed she was a partner even though not named as a partner in the first partnership agreement of July 29, 1939 (R. 84, 89).

(c) That Helen E. Carolin's cash advances and personal services added to the success of the business and that petitioner could not have stayed on in the business without her help (R. 42, 81).

(d) That when the business was incorporated October 1, 1941, petitioner had certificate #1 for 4500 shares issued in the joint names of himself and Helen E. Carolin in recognition of her prior interest in the business (R. 40, 72, 89).

(e) That the reason and purpose for the formation of the partnership in question April 1, 1943 was to comply with the wishes and insistence of petitioner's mother, Louise W. Carolin because incorporation of the business had resulted in the disallowance to her of the percentage rental under the lease as well as salary paid her by the corporation (R. 47).

(f) That the only reason the corporation was not dissolved at the time of the formation of the partnership in question was that by the retention of the underlying lease to the business property in the corporation, petitioner and his wife would be protected from the claims of brothers and sisters upon the death of his mother since they could at that time revert to the corporate form of business in which petitioner and his wife held the majority stock (R. 47).

The fact that Helen E. Carolin contributed services to the business only through 1940 does not detract from the intention of the parties that Helen E. Carolin be a partner in the agreement of April 1, 1943 as respondent argues. The record is clear that Helen E. Carolin continued working at the foundry till the spring of 1941. In the spring of

1941 she was expecting a child which was born November 6, 1941. During pregnancy and for a period after the birth of the child it was not expected that Helen E. Carolin could render services to the partnership formed April 1, 1943. The following year 1944, Helen E. Carolin was quite ill due to tuberculosis (R. 50). These facts likewise are absent from the Tax Court's findings of fact. So it may be seen that for the period from 1941 to 1944 Helen E. Carolin could not perform services. The business did, however, have the benefit of her services in its formative stages. Where the wife could not or was not expected to perform services the courts have recognized her partner status, *Harry L. Poling v. Commissioner,* 7 T. C. M. 619; *Paul L. Kusmick v. Commissioner,* 11 T. C. 288; *H. E. Arnold, Collector v. Julius Schepps,* (C. A. 5th) 166 Fed. (2) 821; *Milton Greenberger v. Commissioner* (C. A. 7th) 49-2 U. S. T. C. 9454.

Respondent discounts Helen E. Carolin's claimed interest in the business derived from her mother-in-law in 1938 because no recital of such interest was made until 1943. Respondent overlooks the uncontroverted testimony that petitioner and his wife believed she was a partner though not named as such in the first agreement of July 29, 1939 (P. 84, 89) and that as early as October 1, 1941, her interest was formally recognized when the stock in the new corporation was made in her name and petitioner's (R. 40, 72, 89).

Respondent minimizes the services rendered by Helen E. Carolin as "a normal incident of their marital relationship". This reasoning is outmoded as legitimate rationale, *Wenig v. Commissioner* (C. A. D. C.) 49-2 U. S. T. C. 9348, *Sam H. Miller v. Commissioner, supra.* The importance of one's services to the business is not lessened

by virtue of the fact that she may be the wife of one of the partners.

Counsel for respondent is in error when he argues that Helen E. Carolin deposited all of her distributive share of the partnership profits in the joint bank account. Helen E. Carolin retained in the business $17,687.59 out of her share of the profits for 1943 and at the end of 1944 there still remained in the business to her account $18,758.62 (Exhibit 32). She had complete control of her retained earnings in the business and they were not at the command of petitioner. The monies that were withdrawn were used principally to pay income taxes and invest in the two single premium policies of insurance on taxpayer's life in which Helen E. Carolin was named the beneficiary. The Tax Court in a recent decision, *Leon Haber v. Commissioner,* 8 T. C. M. 996, in discussing control of business income by the wife of the taxpayer under facts similar to the case at bar stated:

> "While the wife may not have individually withdrawn and spent all of her derivative portion of the partnership income during the years involved, its use in the business in a large sense owned and controlled by her, inured to her benefit and was necessarily reflected in her capital or drawing account, * * *."

The manner in which petitioner and his wife handled their withdrawals is not inconsistent with a *bona fide* intention to join together as partners.[1]

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[1] *Claire L. Canfield v. Commissioner* (C. A. 6th), 48-2 U. S. T. C. 9337, in which husband and wife from their joint withdrawals paid their respective income taxes, the mortgage on their home, furnishings and war bonds, the surplus kept in liquid form in a joint safe deposit box; *Joseph Calcaterra v. Commissioner,* 7 T. C. M. 803 in which the petitioner and his wife had joint bank accounts which were used for both business and living expenses, and that in the *Howard B. Lawton v. Commissioner* (C. A. 6th), 164 F. (2) 380, the parties had a joint bank account out of which Mrs. Lawton paid the household expenses.

CONCLUSION

Respondent has failed to show wherein the decision of the Tax Court and the Court of Appeals below is not in conflict with the decision of this Court in the *Culbertson* case. He has not shown that the decision of the Court of Appeals below is not in conflict with the decisions of the Fifth and Ninth Circuits. He contends the decision of the Court of Appeals may be sustained below on the sole premise that the Tax Court could have come to the same conclusion with due regard to the *Culbertson* opinion. The Fifth and Ninth Circuits and now the Court of Appeals below in the *Sam H. Miller* case hold to the contrary. Definitely a conflict of decisions exists which can only be resolved by the allowance of the writ prayed for.

Respectfully submitted,

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